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## 5.1 Expunging Family Division Records When Offender Reaches 30 Years of Age

MCR 5.925(E)(1)(a) defines “expunge” as “to obliterate or destroy.” The Family Division may at any time for good cause expunge its own files and records pertaining to an offense by or against a minor other than an adjudication of one of several excepted offenses. MCR 5.925(E)(2)(a).\*

\*See Form JC 33.

The court must expunge the records pertaining to offenses, other than the record of an adjudication of one of the offenses noted below, when the person reaches 30 years of age. MCR 5.925(E)(2)(b).

MCR 5.925(E)(2)(a) applies to all offenses other than adjudications for:

- F offenses that if committed by an adult would be punishable by a maximum sentence of life imprisonment;
- F criminal traffic violations; and
- F reportable juvenile offenses.\*

\*See Section 4.10(A) for a list of reportable juvenile offenses.

Placement on the consent calendar of a case involving a criminal violation of the Motor Vehicle Code is permissible even though MCR 5.925(E)(2)(a) and 5.925(E)(3)(a) prohibit expungement of criminal traffic violations from a juvenile’s record. *In re Neubeck*, 223 Mich App 568, 570–75 (1997).\*

\*See Section 6.4 (consent calendar).

**NOTE:** Former MCR 5.913 provided:

“The court may retain a child’s juvenile court delinquency records other than those involving motor vehicle violations until the child is 27, when they must be expunged. The court may retain a child’s motor vehicle violation citations and summonses until the child is 19, when they must be expunged.”

Effective January 1, 1988, former rule MCR 5.913 was superseded by MCR 5.925(E), and delinquency records may now be retained until age 30, with certain exceptions for life offenses. Motor vehicle violation citations are never expunged.

Offenders who had pre-1988 juvenile records and who believe that their offenses will be expunged at age 27 are chagrined to learn that MCR 5.925 now controls record expungement, and that the restrictions of MCR 5.925(E) now make life offenses and criminal traffic violations permanent records of the court.

## 5.2 Expunging Juvenile Diversion Records

MCR 5.925(E)(2)(b) states that the court must expunge the diversion record of a juvenile within 28 days after the juvenile reaches 17 years of age.\*

## 5.3 Setting Aside Juvenile Adjudications

MCR 5.925(E)(1)(b) states that “set aside” means to “negate or rescind.” Except as stated below, a person adjudicated of not more than one juvenile offense and who has no felony convictions may file an application\* with the adjudicating court for the entry of an order setting aside the adjudication. A person may have only one adjudication set aside under this section. MCL 712A.18e(1); MSA 27.3178(598.18e)(1).

### A. Offenses That May Not Be Set Aside

MCL 712A.18e(2)(a)–(c); MSA 27.3178(598.18e)(a)–(c), and MCR 5.925(E)(3)(a) provide that a person shall not apply to have set aside, and the court shall not set aside, any of the following:

- F an adjudication of an offense which if committed by an adult would be a felony for which the maximum punishment is life imprisonment;
- F an adjudication for an offense which if committed by an adult would be a criminal traffic violation; or
- F a conviction following designated proceedings in the Family Division, but a person may have a conviction following designated proceedings set aside as otherwise provided by law.\*

\*See Section 6.3 for a detailed discussion of the Juvenile Diversion Act.

\*See Form JC 66.

\*See Section 5.4, below (setting aside convictions following designated proceedings).

The court may set aside reportable juvenile offenses\* pursuant to the procedures set forth in MCL 712A.18e; MSA 27.3178(598.18e). MCR 5.925(E)(3)(b). However, since MCL 712A.18e(2)(a); MSA 27.3178(598.18e)(2)(a), and MCR 5.925(E)(3)(a) state that life offenses may never be set aside, the procedures mandated by MCR 5.925(E)(3)(b) apply only to reportable offenses that are not also life offenses. Thus, the following life offenses, which are also reportable offenses, may not be set aside:

\*See Section 4.10(A) for a list of reportable juvenile offenses.

- F assault with intent to murder, MCL 750.83; MSA 28.278;
- F assault with intent to rob while armed, MCL 750.89; MSA 28.284;
- F attempted murder, MCL 750.91; MSA 28.286;
- F first-degree murder, MCL 750.316; MSA 28.548;
- F second-degree murder, MCL 750.317; MSA 28.549;
- F kidnapping, MCL 750.349; MSA 28.581;
- F first-degree criminal sexual conduct, MCL 750.520b; MSA 28.788(2);
- F armed robbery, MCL 750.529; MSA 28.797;
- F possession of or manufacture, delivery, or possession with intent to manufacture or deliver 650 grams or more of any Schedule 1 or 2 narcotic or cocaine, MCL 333.7401; MSA 14.15(7401), and MCL 333.7403; MSA 14.15(7403).

## B. Procedure for Application

An application to set aside a juvenile adjudication may not be filed until five years following imposition of the disposition for the adjudication, or five years following completion of any term of detention for the adjudication, or when the person becomes 24 years of age, whichever occurs later. MCL 712A.18e(3); MSA 27.3178(598.18e)(3).

MCL 712A.18e(4)(a)–(g); MSA 27.3178(598.18e)(4)(a)–(g), provides that the application must be signed under oath and contain:

- (a) the applicant's full name and current address;
- (b) a certified record of the adjudication that is to be set aside;
- (c) a statement that the applicant has not been adjudicated of any other juvenile offense;
- (d) a statement that the applicant has not been convicted of any felony offense;
- (e) a statement as to whether the applicant has previously filed an application to set aside this or any other adjudication, and, if so, the disposition of the prior application;

\*See Section 5.3(G), below.

(f) a statement as to whether the applicant has any other criminal charge pending against him or her in any court in the United States or in any other country;

(g) a consent to the use of the nonpublic record to be held by the state police.\*

### C. Submission of Application to State Police

Although the original application is to be filed with the Family Division, MCL 712A.18e(5)–(6); MSA 27.3178(598.18e)(5)–(6), state that the applicant must submit a copy of the application and two sets of fingerprints to the Department of State Police. The Department of State Police then compares the fingerprints to the records of the department, including the nonpublic record, and forwards a set of the fingerprints to the Federal Bureau of Investigation for a comparison to the records of that agency. The Department of State Police then reports its findings, if any, to the court, and the court may not act upon the application until the department reports to the court.

The copy of the application submitted to the Department of State Police must be accompanied by a fee of \$25.00 payable to the State of Michigan. MCL 712A.18e(6); MSA 27.3178(598.18e)(6).

### D. Submission of Application to Attorney General and Prosecuting Attorney

A copy of the application must be served upon the attorney general and, if applicable, upon the office of the prosecuting attorney who prosecuted the offense. The attorney general and the prosecuting attorney must have the opportunity to contest the application. If the adjudication was for an offense that if committed by an adult would be an assaultive crime or serious misdemeanor, and if the name of the victim is known to the prosecuting attorney, the prosecuting attorney must give the victim of that offense written notice of the application and forward a copy of the application to the victim pursuant to the crime victim's rights act, MCL 780.796a; MSA 28.1287(796a). Notice must be sent by first-class mail to the victim's last-known address. The victim has a right to appear at any proceeding concerning the adjudication and to make a written or oral statement. MCL 712A.18e(7); MSA 27.3178(598.18e)(7). For the definition of "assaultive crime," see MCL 712A.18e(7)(a); MSA 27.3178(598.18e)(7)(a), and MCL 770.9a; MSA 28.1106(1). For the definition of "serious misdemeanor," see MCL 712A.18e(7)(b); MSA 27.3178(598.18e)(7)(b), and MCL 780.811(1)(a)(i)–(xv); MSA 28.1287(811)(1)(a)(i)–(xv). For the definition of "victim," see MCL 712A.18e(7)(c); MSA 27.3178(598.18e)(7)(c), and MCL 780.781(1)(g) and (2); MSA 28.1287(781)(1)(g) and (2).

## E. Court Action on the Application

MCL 712A.18e(8); MSA 27.3178(598.18e)(8), provides that, after the state police report is received by the court, the court may require the filing of affidavits and the taking of such proofs as it considers proper before ruling on the application.

For the offense of unlawfully driving away an automobile or attempted UDAA only, an adjudication must be set aside if the applicant follows all of the requirements of this section. For any other offense, the setting aside of an adjudication is conditional and a privilege, not a right. The court may set aside the adjudication if it determines that the circumstances and behavior of the applicant from the date of the applicant's adjudication to the filing of the application warrant setting aside the adjudication and that setting aside the adjudication is consistent with the public welfare. MCL 712A.18e(9)–(10); MSA 27.3178(598.18e)(9)–(10).

## F. Effect of Entry of Order

If the court grants the application and sets aside the sole juvenile adjudication of the applicant, the applicant, for purposes of the law, shall be considered never to have been adjudicated for the offense, except:

- (a) the applicant is not entitled to the remission of any fine, costs, or other sums of money paid as a consequence of an adjudication that is set aside;
- (b) this section does not affect the right of the applicant to rely upon the adjudication to bar subsequent proceedings for the same offense;
- (c) this section does not affect the right of a victim of an offense to prosecute or defend a civil action for damages; and
- (d) this section does not create a right to commence an action for damages for detention under the disposition which the applicant served before the adjudication was set aside pursuant to this section.

MCL 712A.18e(11)(a)–(d); MSA 27.3178(598.18e)(11)(a)–(d).

## G. Access to Records That Have Been Set Aside

MCL 712A.18e(12)–(15); MSA 27.3178(598.18e)(12)–(15), and MCR 5.925(E)(3)(c) deal with the maintenance of and access to the nonpublic records of the state police. If the court grants the application and sets aside the adjudication, the court must expunge its own files and send a copy of the order to the arresting agency and the state police. MCL 712A.18e(12); MSA 27.3178(598.18e)(12), and MCR 5.925(E)(3)(c).

## Section 5.3

\*See Section 12.22 (notice of disposition to state police).

The state police must maintain a nonpublic record of any order setting aside an adjudication and the record of the arrest, fingerprints, adjudication, and disposition of the applicant in the case to which the order applies.\* This nonpublic record is available only to:

- F a court of competent jurisdiction;
- F an agency of the judicial branch of state government;
- F a law enforcement agency;
- F a prosecuting attorney;
- F the Attorney General; or
- F the Governor.

MCL 712A.18e(13); MSA 27.3178(598.18e)(13).

The nonpublic record may be made available to these persons and entities upon request but only for the following reasons:

- (a) for consideration in a licensing function conducted by an agency of the judicial branch of state government;
- (b) for consideration by a law enforcement agency if a person whose adjudication has been set aside applies for employment with a law enforcement agency;
- (c) to show that a person who has filed an application to set aside an adjudication previously had an adjudication set aside pursuant to this section;
- (d) for the court's consideration in determining the sentence to be imposed upon conviction for a subsequent offense that is punishable as a felony or by imprisonment for more than one year; and
- (e) for consideration by the Governor, if a person whose adjudication has been set aside applies for a pardon for another offense.

MCL 712A.18e(13)(a)–(e); MSA 27.3178(598.18e)(13)(a)–(e).

The applicant has the right to secure a copy of the nonpublic record upon payment of a fee to the state police in the same manner as the fee prescribed in MCL 15.234; MSA 4.1801(4) (Freedom of Information Act). However, the nonpublic record maintained by the state police is exempt from disclosure under the Freedom of Information Act. MCL 712A.18e(14)–(15); MSA 27.3178(598.18e)(14)–(15).

## 5.4 Setting Aside Convictions Following Designated Proceedings

MCL 712A.18e(2)(c); MSA 27.3178(598.18e)(2)(c), states that a conviction following designated proceedings in the Family Division shall not be set aside. However, this does not prevent a person convicted after designated proceedings from seeking to have the conviction set aside as otherwise provided by law.\* MCR 5.925(E)(4) states that the court may only set aside a conviction pursuant to MCL 780.621; MSA 28.1274(101).

\*See Form JC 66.

MCL 780.621(1); MSA 28.1274(101)(1), subject to the exceptions listed below, allows a person who is convicted of not more than one offense to file an application with the convicting court for the entry of an order setting aside the conviction.

A person shall not apply to have set aside, and a judge shall not set aside, any of the following:

- F a conviction of a felony for which the maximum punishment is life imprisonment, or an attempt to commit such a felony;
- F a conviction for a violation or attempted violation of any of the following offenses:
  - second-degree criminal sexual conduct, MCL 750.520c; MSA 28.788(3);
  - third-degree criminal sexual conduct, MCL 750.520d; MSA 28.788(4);
  - assault with intent to commit criminal sexual conduct, MCL 750.520g; MSA 28.788(7);
- F a conviction for a traffic offense.

MCL 780.621(2); MSA 28.1274(101)(2).

MCL 780.621; MSA 28.1274(101), was amended, effective April 1, 1997, to preclude setting aside convictions of an attempt to commit a life offense, second-, and third-degree criminal sexual conduct, and assault with intent to commit criminal sexual conduct. See 1996 PA 573. The Michigan Court of Appeals has held that the amendment must be given retroactive effect. *People v Link*, 225 Mich App 211, 214–18 (1997).

### A. Procedure for Application

An application must not be filed until the expiration of five years following imposition of the sentence for the conviction the applicant seeks to set aside, or five years following completion of any term of imprisonment for that conviction, whichever occurs later. MCL 780.621(3); MSA 28.1274(101)(3).

The application is invalid unless it contains the following information and is signed under oath by the person whose conviction is to be set aside:

- (a) the full name and current address of the applicant;
- (b) a certified record of the conviction that is to be set aside;
- (c) a statement that the applicant has not been convicted of an offense other than the one sought to be set aside as a result of this application;
- (d) a statement as to whether the applicant has previously filed an application to set aside this or any other conviction and, if so, the disposition of the application; and
- (e) a statement as to whether the applicant has any other criminal charge pending against him or her in any court in the United States or in any other country;
- (f) a consent to the use of the nonpublic record created under MCL 780.623; MSA 28.1274(103), to the extent authorized by that section.\*

\*See Section 5.4(F), below.

MCL 780.621(4)(a)–(f); MSA 28.1274(101)(4)(a)–(f).

## **B. Submission of Application to State Police**

The applicant must submit a copy of the application and two complete sets of fingerprints to the Department of State Police. The Department of State Police then compares the fingerprints to the records of the department, including the nonpublic record, and forwards a set of the fingerprints to the Federal Bureau of Investigation for a comparison to the records of that agency. The Department of State Police then reports its findings, if any, to the court, and the court may not act upon the application until the department reports to the court. MCL 780.621(5); MSA 28.1274(101)(5).

The copy of the application submitted to the Department of State Police must be accompanied by a fee of \$25.00 payable to the State of Michigan. MCL 780.621(6); MSA 28.1274(101)(6).

## **C. Submission of Application to the Attorney General and Prosecuting Attorney**

A copy of the application must be served upon the attorney general and upon the office of the prosecuting attorney who prosecuted the crime. The attorney general and the prosecuting attorney must have the opportunity to contest the application. If the conviction was for an assaultive crime or serious misdemeanor, and if the name of the victim is known to the prosecuting attorney, the prosecuting attorney must



give the victim of that offense written notice of the application and forward a copy of the application to the victim pursuant to MCL 780.772a; MSA 28.1287(772a), and MCL 780.827a; MSA 28.1287(827a), of the felony and misdemeanor Crime Victim's Rights Acts. The notice must be by first-class mail to the victim's last known address. The victim has a right to appear at any proceeding concerning the conviction and to make a written or oral statement. MCL 780.621(7); MSA 28.1274(101)(7). For the definition of "assaultive crime," see MCL 780.621(10)(a); MSA 28.1274(101)(10)(a), and MCL 770.9a; MSA 28.1106(1). For the definition of "serious misdemeanor," see MCL 780.621(10)(b); MSA 28.1274(101)(10)(b), and MCL 780.811(1)(a)(i)–(xv); MSA 28.1287(811)(1)(a)(i)–(xv). For the definition of "victim," see MCL 780.621(10)(c); MSA 28.1274(101)(10)(c), and MCL 780.752(1)(i) and (2); MSA 28.1287(752)(1)(i) and (2).

#### D. Court Action on the Application

MCL 780.621(8); MSA 28.1274(101)(8), provides that upon the hearing of the application the court may require the filing of affidavits and the taking of proofs as it considers proper. If the court determines that the circumstances and behavior of the applicant from the date of the applicant's conviction to the filing of the application warrant setting aside the conviction and that setting aside the conviction is consistent with the public welfare, the court may enter an order setting aside the conviction. The setting aside of a conviction under this act is a privilege and conditional and is not a right. MCL 780.621(9); MSA 28.1274(101)(9). See *People v Rosen*, 201 Mich App 621, 622–24 (1993) (decision to be made by balancing the circumstances and behavior of the offender and the public welfare; nature of offense alone does not preclude setting aside the conviction).

#### E. Effect of Entry of Order

MCL 780.622(1); MSA 28.1274(102)(1), states that, after entry of an order setting aside a conviction, the applicant shall be considered not to have been previously convicted. However:

- (2) the applicant is not entitled to the remission of any fine, costs, or other money paid as a consequence of a conviction that is set aside;
- (3) if the conviction set aside is for a "listed offense"\* under the Sex Offenders Registration Act, the applicant is considered to have been convicted of that offense for purposes of the Sex Offenders Registration Act;
- (4) the right of the applicant to rely on the conviction to bar subsequent proceedings for the same offense is not affected;
- (5) the right of a victim to prosecute or defend a civil action for damages is not affected; and

\*See Section 4.11(C).

(6) the act does not create a right to commence an action for damages for incarceration under the sentence served before the conviction is set aside.

MCL 780.622(2)–(6); MSA 28.1274(102)(2)–(6).

## **F. Access to Records that Have Been Set Aside**

MCL 780.623; MSA 28.1274(103), allows the state police to retain a nonpublic record of the order setting aside the conviction and a record of the arrest, fingerprints, conviction, and sentence of the applicant in the case to which the order applies. This nonpublic record shall be made available upon request but only to:

- F a court of competent jurisdiction;
- F an agency of the judicial branch of state government;
- F a law enforcement agency;
- F a prosecuting attorney;
- F the Attorney General; or
- F the Governor.

The nonpublic record may be made available to these persons and entities only for the following reasons:

- (a) for consideration in a licensing function conducted by an agency of the judicial branch of state government;
- (b) to show that a person who has filed an application to set aside a conviction previously had a conviction set aside pursuant to this section;
- (c) for the court’s consideration in determining the sentence to be imposed upon conviction for a subsequent offense that is punishable as a felony or by imprisonment for more than a year;
- (d) for consideration by the Governor, if a person whose adjudication has been set aside applies for a pardon for another offense;
- (e) for consideration by a law enforcement agency if a person whose conviction has been set aside applies for employment with the law enforcement agency; and
- (f) for consideration by a court, law enforcement agency, prosecuting attorney, or the attorney general in determining whether an individual required to be registered under the Sex Offenders Registration Act has violated that act, or for use in a prosecution for violating that act.\*

\*See Section 4.11.

MCL 780.623(2)(a)–(f); MSA 28.1274(103)(2)(a)–(f).

A copy of the nonpublic record must also be provided to the person whose conviction is set aside upon payment of a fee to the state police in the same manner as the fee prescribed in MCL 15.234; MSA 4.1801(4) (Freedom of Information Act). MCL 780.623(3); MSA 28.1274(103)(3). However, the nonpublic record is exempt from disclosure under the Freedom of Information Act. MCL 780.623(4); MSA 28.1274(103)(4).

## **5.5 Access to Record of Conditional Sentence Under §7411 of the Controlled Substances Act**

For certain juveniles convicted of certain controlled substance offenses, a conditional sentence may be imposed under MCL 333.7411; MSA 14.15(7411). The state police must maintain a nonpublic record of an arrest and discharge or dismissal under this provision. The record must be furnished to a court or police agency upon request for the purpose of showing that a defendant in a criminal action involving the possession or use of a controlled substance, or an imitation controlled substance as defined in MCL 333.7341; MSA 14.15(7341), covered in this provision has already once utilized this provision. MCL 333.7411(1); MSA 14.15(7411)(1).

The adjudication and disposition of a delinquent juvenile pursuant to MCL 712A.2(a)(1); MSA 27.3178(598.2)(a)(1), and MCL 712A.18; MSA 27.3178(598.18), are not a “conviction” for purposes of MCL 333.7411; MSA 14.15(7411).

